

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

27

RICHARD A. MCBRAYER,

Petitioner,

v.

Case No. ES 04-CV-73235 DT
Hon. Lawrence P. Zatkoff

HUGH WOLFENBARGER, Warden,

Respondent.

BRENDA E. TURNER (P24705)
Assistant Attorney General
Attorney for Respondent

RICHARD MCBRAYER
Petitioner in Pro Per

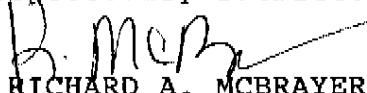
F I L E D
OCT 20 2005
CLERK'S OFFICE
DETROIT

NOTICE OF MOTION TO REOPEN TIME FOR APPEAL

TO: BRENDA E. TURNER (P24705)
Assistant Attorney General of Michigan
Attorney for Respondent
Criminal Appellate Division
P.O. Box 30217
Lansing, MI 48909

PLEASE TAKE NOTICE that the Petitioner, RICHARD A. MCBRAYER, will move the District Court, Hon. Lawrence P. Zatkoff, to grant the attached motion and brief to reopen the time for appeal in this case from the May 5, 2005, order and May 11, 2005 judgment in favor of respondent, for failure to notify.

Respectfully submitted,


RICHARD A. MCBRAYER
Inmate No. 235965
Macomb Correctional Facility
34625 26 Mile Road
New Haven, MI 48048
Petitioner in Pro Per

Dated: October 17, 2005.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

F I L E D
OCT 20 2005

CLERK'S OFFICE
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RICHARD A. MCBRAYER,

Petitioner,

v.

Case No. ES 04-CV-73235 DT
Lawrence P. Zatkoff

HUGH WOLFENBARGER, Warden,

Respondent. /

BRENDA E. TURNER (P24705)
Assistant Attorney General
Attorney for Respondent
Criminal Appellate Division
P.O. Box 30217
Lansing, MI 48909
Tel: (517) 373-4875

RICHARD MCBRAYER
Inmate No. 235965
Petitioner In Pro Per
Macomb Correctional Facility
34625 26 Mile Road
New Haven, MI 48048

MOTION TO REOPEN TIME TO FILE APPEAL
OR IN THE ALTERNATIVE,
MOTION FOR RELIEF FROM ORDER AND JUDGMENT

NOW COMES petitioner, RICHARD A. MCBRAYER, acting In Pro Per, and pursuant to Fed. R. App. P. 4(6), respectfully moves this Honorable Court to Reopen the Time to file an Appeal, or in the alternative, for Relief from Judgment under Fed. R. Civ. P. 61(b), on the grounds that petitioner never received a copy of the court's opinion, order and judgment in favor of Respondent.

Brief in Support of Motion to Reopen Time to file Appeal
or in the alternative,
Motion for Relief from Judgment.

A. Concise Statement of Material Facts and Proceedings.

Petitioner, a state prisoner, filed an In Pro Per Application for Writ of Habeas Corpus on August 20, 2004, (docket #1, app. A). The Application for Writ of Habeas Corpus clearly identifies the petitioner's name, prison number, and mailing address as follows: Richard A. McBrayer, Inmate No: 235965, Macomb Correctional Facility, 34625 26 Mile Road, New Haven, MI 48048, (App. A). The docket summary, however, does not contain petitioner's prison number and lists petitioner's mailing address as: Macomb Regional Correctional Facility, 34625 26 Mile Road, P.O. Box 480999, New Haven, MI 48048. (app. B).

On August 28, 2004, the District Court issued an order requiring a response due by March 3, 2005, (docket #2). On September 9, 2004, Assistant Attorney General, Brenda E. Turner filed an appearance on behalf of Respondent, (docket #3). On March 2, 2005, the respondent, through his counsel, filed a motion and brief for summary judgment claiming that the Application for Writ of Habeas Corpus is time-barred under the applicable statute of limitations, (docket #4). On March 14, 2005, the Court Clerk received the state court record consisting of various documents (Docket #'s 5-12, respectively). On March 28, 2005, petitioner filed a response and supplemental authority opposing the motion for summary judgment, (Docket #13). On May 9, 2005, the Court issued an unspecified order related to "re 1 Petition for Writ of Habeas Corpus..." which was entered the same day, (docket #14). The court also issued

a judgment in favor of respondent on May 5, 2005, but not entered until May 11, 2005, (docket #15).

On September 9, 2005, petitioner wrote the court and requested a copy of the docket summary in this case, (app. C). The court mailed a copy of the docket summary to petitioner on or about September 28, 2005, (app. B). Two days later, on September 30, 2005, petitioner received the docket summary and from that document, first learned that the court had issued an order and judgment in favor of respondent. On this same day (September 30, 2005), petitioner wrote and mailed letters to Judge Zatkoff, the Court Clerk, the Court Administrator, Leonard Green, Chief Clerk, United States Court of Appeals for the Sixth Circuit, and to Brenda Turner, Assistant Attorney General, asking for a copy of the Court's order and judgment and explaining that petitioner had not received the order and judgment, (app. D-H). As of this date (October 17, 2005), the petitioner has still not received a copy of the District Court's order and judgment, (Affidavit of Richard A. McBrayer, app. G).

B. Statement of Issue Presented.

Petitioner never received a copy of the order and judgment issued by the Court in dockets 14-15. The person(s) responsible for docket summary upkeep listed a different mailing address than appears on any document filed by petitioner, and is not the mailing address to the facility where your petitioner has been confined, and remains to be housed today. In fact, contrary to the address contained on the docket summary, petitioner's mailing address does not have a P.O. Box and must contain his prison number. Had petitioner timely received a copy of the order and judgment he

may have elected to request a Certificate of Appealability pursuant to 28 USC 2253, et seq., from the District Court Judge or Appellate Court and filed a Notice of Appeal within the required 30 days from the date judgment was entered in compliance with Fed. R. App. 4a(1)(A).

The rules governing appeals in state prisoner habeas corpus actions and established case law allows the District Court to reopen the time for filing an appeal or to grant relief from judgment in these very circumstances.

The issue presented, therefore, is whether this motion is allowed by court rule and case law?

1. Discussion of court rule and case law.

The docket summary includes a P.O. Box number within the petitioner's prison mailing address. The petitioner submits that the P.O. Box is not part of his mailing address, does not appear on any document filed by petitioner with the Court, and is probably the reason why your petitioner never received the order and judgment in this case, or it was simply never mailed to him at all. The Federal Rules of Appellate Procedure allow the District Court to reopen the time for appeal in such circumstances. Fed. R. App 4(6)(B), authorizes the District Court to reopen the time to file an appeal upon finding that:

"[T]he moving party was entitled to notice of the entry of judgment or order sought to be appealed but did not receive the notice from the district court or any party within 21 days after entry; and,

(C) the court finds that no party would be prejudiced.

Clearly, the above rule allows for the "reopening of the time for appeal" when a party has not been notified of judgment.

A lapse in applicable time-limits for seeking appellate review has been recognized excusable where no notice of judgment had been received by a party. Silivanch v. Celebrity Cruises, Inc., 333 F.3d 355, 362-363 (2nd Cir. 2003). Cf., Tesmer v. Granholm, 333 F.3d 683, 704 (6th Cir. 2003)(remanding for re-entry of judgment in order to satisfy jurisdictional time requirements for taking an appeal).

The petitioner was entitled to notice of the judgment and to receive a copy of the Court's opinion and order denying habeas corpus relief. Through no fault of his own, the petitioner did not receive notice and has yet to be provided with a copy of this Court's opinion, order and judgment. Under these circumstances, the Court must direct the clerk to provide petitioner with a copy of the decision, order and judgment and reopen the time for appeal with adequate time for petitioner to review this Court's opinion and order to determine what grounds may exist for review.

2. Discussion of the facts.

The facts here show filing of the habeas petition on August 20, 2004. The petitioner's address (as typed in the petition itself and on the face cover of petitioner's brief), clearly lists his address as: Richard A. McBrayer, Inmate No. 235965, Macomb Correctional Facility, 34625 26 Mile Road, New Haven, MI 48048. The docket summary, however, does not contain petitioner's prison number and lists his mailing address as: Richard A. McBrayer, Macomb Regional Facility, 34625 26 Mile Road, P.O. Box 480999,

New Haven, MI 48048-0999. The p.o. box has not been used by prison officials and postal service for this facility for several years and is an inappropriate and invalid address. The petitioner did not receive the Court's opinion, order or judgment, and if mailed to the address listed on the docket summary, is probably why it was never received, (if indeed it was even mailed at all). The petitioner only learned that his habeas petition was denied after he requested and received a copy of the docket summary on September 30, 2005. He has not received any mail from the Federal District Court during May, June, July, August, or September 2005, and has not received any opinion, order, or judgment as of the date of writing this motion (October 17, 2005). When petitioner learned that the Court had issued its decision and judgment, he wrote to the Court, court clerk, court administrator, the chief clerk for the Federal Court of Appeals and the attorney general, seeking guidance and requesting a copy of the District Court opinion, order and judgment. This motion is now filed.

WHEREFORE, petitioner respectfully requests this Court to reopen the time for appeal and take such further action as may be required by court rule and case law to preserve his ability to apply for a certificate of appealability and/or to seek appellate review.

I declare that the facts contained herein are true, correct and accurate to the best of my own personal knowledge, information and belief.

Respectfully Submitted,

RICHARD A. MCBRAYER
Inmate No: 235965
Macomb Correctional Facility
34625 26 Mile Road
New Haven MI. 48048
Petitioner in Pro Per

Dated: October 18, 2005.

PROOF OF SERVICE

I, RICHARD A. MCBRAYER, hereby confirms that he mailed a copy of Motion/Brief to Reopen Time for Appeal, or in the alternative, for Relief from Judgment, Motion to Proceed in Forma Pauperis, Verified Statement of Prison Account and Personal Assets, and Motion for Certificate of Appealability upon BRENDA E. Turner (P24705), Assistant Attorney General, P.O. Box 30217, Lansing, MI 48909, by placing said copies in an envelop with first class postage fully prepaid thereon, and depositing said envelop in the United States Mail on this 18th day of October 2005.



Richard A. McBrayer
Affiant

APPENDIX A
Docket Summary

U.S. District Court
Eastern District of Michigan (Detroit)
CIVIL DOCKET FOR CASE #: 2:04-cv-73235-LPZ-SDP

McBrayer v. Wolfenbarger

Assigned to: Honorable Lawrence P Zatkoff

Referred to: Honorable Steven D Pepe

Demand: \$

Lead Docket: None

Related Cases: None

Case in other court: None

Cause: No cause code entered

Date Filed: 08/20/04

Jury Demand: Nonc

Nature of Suit: 530 Habeas Corpus
(General)

Jurisdiction: Federal Question

Petitioner

Richard A. McBrayer

represented by **Richard A. McBrayer**

Macomb Regional Correctional Facility

34625 26 Mile Road

P.O. Box 480999

New Haven, MI 48048

PRO SE

V.

Respondent

Hugh Wolfenbarger, Warden

represented by **Brenda E. Turner**

Michigan Department of Attorney
General

P.O. Box 30217

Lansing, MI 48909-7717

517-373-4875

Email: turnerbe@michigan.gov

LEAD ATTORNEY

ATTORNEY TO BE NOTICED

Filing Date	Num#	Docket Text
08/20/2004	<u>1</u>	PETITION for Writ of Habeas Corpus filed by Richard A. McBrayer against Hugh Wolfenbarger, Receipt No. 512500. (Attachments: # <u>1</u> Document Continuation)(KGeha,) [Entry Date 08/24/2004]
08/27/2004	<u>2</u>	ORDER Requiring Response to <u>1</u> Petition for Writ of Habeas Corpus.

		Response due: 3/3/2005. Signed by Honorable Donald A Scheer. (KGeha,) [Entry Date 08/31/2004]
09/28/2004	<u>3</u>	ATTORNEY APPEARANCE: Brenda E. Turner appearing on behalf of Hugh Wolfenbarger.(KGeha,) [Entry Date 10/01/2004]
03/02/2005	<u>4</u>	RESPONSE to Petition for Writ of Habeas Corpus <i>w/certificate of service</i> by Hugh Wolfenbarger. (Attachments: # <u>1</u> Exhibit Unpublished Case)(Turner, Brenda) [Entry Date 03/02/2005]
03/14/2005	<u>5</u>	NOTICE of Filing Rule 5 Materials by Hugh Wolfenbarger. (KGeha,) [Entry Date 03/15/2005]
03/14/2005	<u>6</u>	STATE Court Record - Case No. 93-002894-FC.(KGeha,) [Entry Date 03/15/2005]
03/14/2005	<u>7</u>	STATE Court Transcript of plea held on 1/13/94.(KGeha,) [Entry Date 03/15/2005]
03/14/2005	<u>8</u>	STATE Court Transcript of sentence held on 3/2/94.(KGeha,) [Entry Date 03/15/2005]
03/14/2005	<u>9</u>	STATE Court Record - Michigan Court of Appeals Case No. 174683. (KGeha,) [Entry Date 03/15/2005]
03/14/2005	<u>10</u>	STATE Court Record - Michigan Supreme Court Case No. 104335. (KGeha,) [Entry Date 03/15/2005]
03/14/2005	<u>11</u>	STATE Court Record - Michigan Court of Appeals Case No. 204288. (KGeha,) [Entry Date 03/15/2005]
03/14/2005	<u>12</u>	AFFIDAVIT of Corbin R. Davis.(KGeha,) [Entry Date 03/15/2005]
03/28/2005	<u>13</u>	RESPONSE (supplemental authority and argument) to <u>4</u> Response to Habeas Petition by Richard A. McBrayer. (DTyle,) [Entry Date 03/29/2005]
05/09/2005	<u>14</u>	ORDER re <u>1</u> Petition for Writ of Habeas Corpus filed by Richard A. McBrayer., <u>4</u> Response to Habeas Petition filed by Hugh Wolfenbarger., <u>13</u> Response (Free) filed by Richard A. McBrayer,. Signed by Honorable Lawrence P Zatkoff. (MVer,) [Entry Date 05/09/2005]
05/09/2005	<u>15</u>	JUDGMENT in favor of respondent against petitioner Signed by Honorable Lawrence P Zatkoff. (DHane,) [Entry Date 05/11/2005]

APPENDIX B

Letter requesting Docket Summary

9-22-05

RICHARD A. MCBRAYER 235965
MACOMB CORF. FAC.
34625 26 MILE RD.
NEW HAVEN MI. 48048

COULD I PLEASE RECEIVE A COPY OF THE DOCKET SUMMARY FOR
CASE...

RICHARD A. MCBRAYER VS. HUGH WOLFENBARGER
CASE NO. ES-04-CV-73235-DT

THANK YOU FOR YOUR TIME IN THIS MATTER.

RESPECTFULLY,



R. McBrayer

A handwritten signature in black ink, appearing to read "R. McBrayer". The signature is fluid and cursive, with the initials "R." and "McBrayer" clearly legible.

APPENDIX C

Letter to Judge Lawrence P. Zatkoff

Richard A. McBrayer
Inmate No: 235965
Macomb Correctional Facility
34625 26 Mile Road
New Haven, Michigan 48048

September 30, 2005

Hon. Lawrence P. Zatkoff
United States District Court Judge
133 U.S. Courthouse
Detroit, MI 48226

RE: Richard A. McBrayer -v- Warden Hugh Wolfenbarger,
Civil Action No: 2:04-cv-73235

Dear Judge Zatkoff,

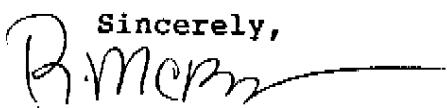
I enclose a copy of the letter I sent to Leonard Green, Chief Clerk, for the Sixth Circuit Court of Appeals.

Please be advised that I have not received a copy of the order and judgment you issued in the above case denying my In Pro Per Application for Writ of Habeas Corpus.

I have ask Mr. Green for guidance on how I should proceed since I did not receive the order and judgment and might want to seek review in the Sixth Circuit Court of Appeals.

I would appreciate anything you can do to correct this oversight so I am not prohibited from seeking a certificate of appealability and/or pursuing this matter if I am in disagreement with the District Court opinion.

Your immediate attention is appreciated.


Sincerely,
Richard A. McBrayer

RAM/hf

APPENDIX D

Letter to District Court Clerk

&

Chief Clerk, 6th Circuit Court of Appeals

Richard A. McBrayer
Inmate No: 235965
Macomb Correctional Facility
34625 26 Mile Road
New Haven, Michigan 48048

September 30, 2005

Clerk of the Court
United States District Court
Eastern District of Michigan
Theordore Levin U.S. Courthouse
231 W. Lafayette Blvd.,
Detroit, MI 48226

RE: Richard A. McBrayer -v- Warden Hugh Wolfenbarger,
Civil Action No: 2:04-cv-73235

Dear Sir/Madam:

I enclose a copy of the letter I sent to Leonard Green, Chief Clerk, for the Sixth Circuit Court of Appeals.

Please be advised that I have not received a copy of the order and judgment issued in the above case denying my In Pro Per Application for Writ of Habeas Corpus. I learned of the order and judgment on September 29th, after I received a copy of the docket summary that I request from the court clerk.

I have ask Mr. Green for guidance on how I should proceed since I have not receive the order and judgment and might want to seek review in the Sixth Circuit Court of Appeals.

I would appreciate anything you can do to correct this oversight so I am not prohibited from seeking a certificate of appealability and/or pursuing this matter if I am in disagreement with the District Court opinion.

Your immediate attention is appreciated.

Sincerely,


Richard A. McBrayer

RAM/hf

Richard A. McBrayer
Inmate No: 235965
Macomb Correctional Facility
34625 26 Mile Road
New Haven, Michigan 48048

September 30, 2005

Leonard Green, Chief Clerk
United States Court of Appeals
For The Sixth Circuit
532 Potter Stewart, U.S. Courthouse
100 E. Fifth St.,
Cincinnati, Ohio 45202-3988

RE: Richard A. McBrayer v. Warden Hugh Wolfenbarger,
Civil Action No: 2:04-cv-73235-LPZ-SDP

District Court Location: Eastern District of Michigan.

Type of Action: Habeas Corpus/State Prisoner, 28 USC 2254.

District Court Judge: Hon. Lawrence P. Zatkoff

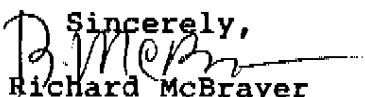
Dear Mr. Green:

On September 29, 2005, I received a copy of the docket summary I requested from the District Court Clerk to check on the status of my In Pro Per Application for Writ of Habeas Corpus. The docket shows (#14 and #15) that on 05/09/2005, Judge Zatkoff issued an order and judgment in favor of the respondent. The docket also reflects that the order was entered on 05/09/2005 and judgment entered on 05/11/2005. These are the last two entries listed in the case docket summary.

The problem is I have never received the Order nor Judgment issued by Judge Zatkoff. I very well might want to seek review of the order and judgment issued by the United States District Court but have not had the opportunity to make that decision since I have not seen or read the judge's opinion on the issues raised by the parties.

I would appreciate it if your office will give guidance on how I should proceed, or take appropriate measures to correct the oversight so I am not penalized from pursuing the matter before the Sixth Circuit Court of Appeals.

Your prompt response is appreciated.

Sincerely,

Richard McBrayer

RAM/hf
xc: Judge Zatkoff, U.S. District Judge
District Court Clerk's Office
Court Administrator's Office
Brenda E. Turner, Assistant
Attorney General of Michigan

APPENDIX E

Letter to Court Administrator

Richard A. McBrayer
Inmate No: 235965
Macomb Correctional Facility
34625 26 Mile Road
New Haven, Michigan 48048

September 30, 2005

Court Administrator
United States District Court
Eastern District of Michigan
Theordore Levin U.S. Courthouse
231 W. Lafayette Blvd.,
Detroit, MI 48226

RE: Richard A. McBrayer -v- Warden Hugh Wolfenbarger,
Civil Action No: 2:04-cv-73235

Dear Sir/Madam:

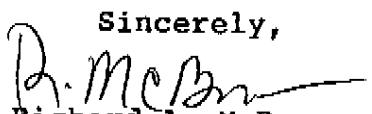
I enclose a copy of the letter I sent to Leonard Green, Chief Clerk, for the Sixth Circuit Court of Appeals.

Please be advised that I have not received a copy of the order and judgment issued in the above case denying my In Pro Per Application for Writ of Habeas Corpus. I learned of the order and judgment on September 29th, after I received a copy of the docket summary that I request from the court clerk.

I have ask Mr. Green for guidance on how I should proceed since I have not receive the order and judgment and might want to seek review in the Sixth Circuit Court of Appeals.

I would appreciate anything you can do to correct this oversight so I am not prohibited from seeking a certificate of appealability and/or pursuing this matter if I am in disagreement with the District Court opinion.

Your immediate attention is appreciated.

Sincerely,

Richard A. McBrayer

RAM/hf

APPENDIX F

Letter to Assistant Attorney General Brenda E. Turner

Richard A. McBrayer
Inmate No: 235965
Macomb Correctional Facility
34625 26 Mile Road
New Haven, Michigan 48048

September 30, 2005

Brenda E. Turner
Assistant Attorney General
P.O. Box 30217
Lansing, MI 48909

RE: Richard A. McBrayer -v- Warden Hugh Wolfenbarger,
Civil Action No: 2:04-cv-73235

Dear Ms. Turner:

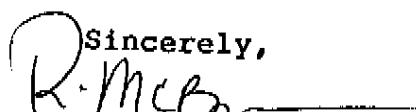
I recently obtained a docket summary from the clerk's office in relation to my habeas corpus petition. When I reviewed the docket summary I noticed it shows that Judge Zatkoff issued an order and judgment in respondent's favor.

I did not receive a copy of the order or judgment and am wondering if you did? Please advise.

I enclose a copy of the letter I sent to Leonard Green, chief clerk, for the Sixth Circuit Court of Appeals.

I would appreciate anything you can offer so I am not prohibited from seeking review of the District Court's opinion and order.

Your attention and response is appreciated.


Sincerely,
R. McBrayer
Richard McBrayer

RAM/hf

APPENDIX H

Face Cover Page/Petitioner Brief/Habeas Corpus

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

RICHARD A. MCBRAYER,

Petitioner,

CIVIL ACTION NO.

-VS-

HUGH WOLFENBARGER, Warden,
Macomb Correctional Facility,

Respondent

/

BRIEF IN SUPPORT OF APPLICATION
FOR WRIT OF HABEAS CORPUS

Richard A. McBrayer
Inmate No: 235965
Macomb Correctional Facility
34625 26 Mile Road
New Haven, MI 48048
In Pro Per

APPENDIX G

Affidavit of Richard A. McBrayer

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

FILED
OCT 20 2005
CLERK'S OFFICE
DETROIT

RICHARD A. MCBRAYER,

Petitioner,

v.

Case No. ES 04-CV-73235 DT
Hon. Lawrence P. Zatkoff

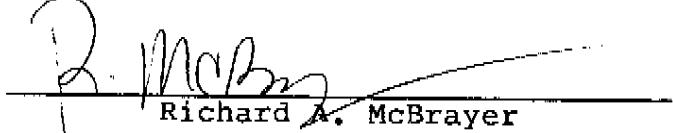
HUGH WOLFENBARGER, Warden,

Respondent. /

AFFIDAVIT OF RICHARD A. MCBRAYER

I, RICHARD A. MCBRAYER, hereby confirms under penalty of perjury, as follows:

1. I am the petitioner in the above captioned case.
2. That on September 9, 2005, I wrote to the court clerk and requested a copy of the docket summary in this case, and on September 30, 2005, received a copy of the same.
3. When I reviewed the docket summary I discovered that the Court had issued an order and judgment in favor of the respondent.
4. That as of this date (October 17, 2005), I have not yet received a copy of the order and judgment, though I have requested the same from the Court, the court clerk, and the respondent's attorney of record. Nobody has responded to my request.
5. That the court can verify my claim of not receiving legal mail between May 1994 and September 29, 2005, from the District Court from the prison mail room who logs all legal mail. The mail room will not provide me with copies of log book entries.
6. Further your affiant saith not.


Richard A. McBrayer
Affiant

Dated: October 17, 2005.